In the Supreme Court of the United States

OCTOBER TERM 1966

No. ~~730~~ 121

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

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INDEX

	Page
I. Opinions Below	1
II. Grounds for Jurisdiction	2
(i) Nature of proceeding and statute involved	2
(ii) Court orders appealed from	4
Notice of Appeal filed	5
(iii) Statutory provisions conferring jurisdiction	5
(iv) Cases sutaining jurisdiction	5
(v) Sec. 111.070, Oregon Revised Statutes (Chapter 519, Oregon Laws 1951) set forth in full	6
III. Questions Presented	7
IV. Statement of the Case	9
The Facts	9
Federal Questions Raised and Passed Upon in Courts Below	10
V. Federal Questions Presented Are so Substantial as to Require Plenary Consideration by this Court	12
A Great Urgency Exists	20
Questions of Great Public Importance Presented	21
VI. Conclusion	24
Appendix:	
Opinion, Supreme Court of Oregon, March 23, 1966	1
Opinion, Supreme Court of Oregon, June 3, 1966 (denying Petition for Rehearing)	24
Findings and Order of Escheat, Circuit Court of Multnomah County, Oregon, April 15, 1965	25
Order of Mandate, Circuit Court of Multnomah County, Oregon, June 27, 1966	28
Oral Opinion, Circuit Court of Multnomah County, Oregon, April 9, 1965	30

INDEX (Cont.)

Page

Addendum:

Appellee administrator Miller as stakeholder not active participant in this litigation on Appendix p. 32

CITATIONS

Page

CASES

Arbulich's Estate, 41 Cal. 2d 86, 257 P.2d 433 (1953) 16
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 21
Belemecich's Estate, 411 Pa. 506, 192 A.2d 740 (1963), 375 U.S. 395 (1964) 16, 18
Chichernea's Estate, 244 A.C.A. 727, 53 Cal. Rptr. 535 (1966) 23
Clark v. Allen, 331 U.S. 503 (1947) 9, 10, 11, 12, 13, 14, 17, 22, 23, 24
Dahnke-Walker Milling Co. v. Bondurant 257 U.S. 282 (1922) 5
Fiske v. Kansas, 274 U.S. 380 (1927) 5
Gogabashvele's Estate, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961) 22
Hosova's Estate, 143 Mont. 74, 387 P.2d 305 (1963) 16
Ioannou v. New York, dissent 371 U.S. 30 (1962) 18, 19, 23, 24
Kennedy's Estate, 106 Cal. App. 2d 621, 235 P.2d 837 (1951) 23
Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954) 5
Larkin and Terry Estates, 65 A.C. 49, 52 Cal. Rptr. 441 (1966) 22
Lappy's Estate, State Land Board of Oregon v. Sovenko, 202 Or. 571, 277 P.2d 781, 213 Or. 368, 322 P.2d 908 (1958) ..... on Appendix p. 32
Marcus v. Search Warrant, 367 U.S. 717 (1961) 5
Nashville C. & St. L. Ry. Co. v. Walters, 294 U.S. 405 (1935) 5, 13, 22
Spoya's Estate, 129 Mont. 83, 282 P.2d 456 (1955) 16
State Land Board of Oregon v. Kolovrat, 220 Or. 448, 349 P.2d 255 (1960), 366 U.S. 187 (1961) 16
State Land Board of Oregon v. Pekarek, 234 Or. 74, 378 P.2d 734 (1963) 14
Stoian's Estate, 128 Mont. 52, 269 P.2d 1085 (1954) 16

CITATIONS (Cont.)

Page

STATUTES

California, Probate Code § 259 ..... 14, 17, 23, 24
Iowa, § 567.8 I.C.A. 17
Montana, § 91-520, R.C.M. 1947 17
Nebraska, 1963, c. 21 § 1, p. 104, § 4-107 R. S. Supp. 1965 17
New York, § 269a Surrogate's Court Act 17, 19
Oregon Revised Statutes, Sec. 111.070, set forth in full 6
Mentioned: 3, 4, 5, 6, 7, 10, 12, 14, 17, 21, 22
O.C.L.A. 61-107 (Ch. 399, Oregon Laws 1937) 5, 7, 17
Pennsylvania, Act of July 28, 1953, P.L. 674 17
U.S.C. Title 28, § 1257 (2) 5, 12
United States Constitution
Article I, § 8 7
Article I, § 10 ..... 7, 11
Article VI 11
Fourteenth Amendment 7, 24

REGULATIONS

31 CFR § 211.3(a), Treasury Dept. Circular 655 15

MISCELLANEOUS

Boyd, "The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates," 51 Georgetown Law Journal 470 (1963) 18, 23
Duke Law Journal, 1963, p. 315 "State Reciprocity Statutes and the Inheritance Rights of Nonresident Aliens" 19
Hawley, Succession, 1964 Annual Survey of American Law 585 23
Oregon Law Review, Vol. 45, No. 3, p. 221 "International Law—Inheritance by Nonresident Aliens in Oregon; The Oregon Statute, the Effect of Treaties, and the Federal Law" 19

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Appellees.

Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

I. Opinions Below

The opinion of the Circuit Court of Multnomah County, Oregon, was delivered orally by the Honorable William L. Dickson, Circuit Judge, on April 9, 1965, and is not reported officially or unofficially. The re-

porter's transcript thereof is at page 9 of the Appellant's Abstract of Record and Brief before the Supreme Court of Oregon.

The opinion of the Supreme Court of Oregon filed March 23, 1966, affirming the Findings and Order of Escheat of the Circuit Court as modified is reported in 82 Or. Adv. Sh. 435, — Or. —, 412 P.2d 781.

The opinion of the Supreme Court of Oregon filed June 3, 1966, denying appellants' petition for rehearing is reported in 82 Or. Adv. Sh. 861, — Or. —, 415 P.2d 15.

The opinions of the Circuit Court and of the Supreme Court of Oregon are set forth in the Appendix, *infra*.

The Findings and Order of Escheat appealed from entered by the Circuit Court of Multnomah County, Oregon, on April 15, 1965, is at page 10 of the Appellants' Abstract of Record and Brief before the Supreme Court of Oregon, and is set forth in the Appendix, *infra*.

The Order on Mandate entered by the Circuit Court of Multnomah County, Oregon, on June 27, 1966, modifying the said Findings and Order of Escheat appealed from in the manner directed in the above mentioned opinions of the Supreme Court of Oregon, and the Mandate of said Court issued June 8, 1966, is also set forth in the Appendix, *infra*.

II. Grounds for Jurisdiction

(i) This cause originated with the filing of a Petition for Finding and Order of Escheat in the probate de-

partment of the Circuit Court of Multnomah County, Oregon, by the State Land Board of Oregon [composed of the Governor, Secretary of State and State Treasurer] which is the recipient and custodian of escheated property under Oregon law, asking that the clear proceeds of the estate of Pauline Schrader, deceased, be escheated to the State of Oregon on the grounds that the next of kin and heirs at law of said decedent reside in "East Germany," that the rights required by Section 111.070, Oregon Revised Statutes [the so-called reciprocal inheritance rights statute] do not exist with respect to "East Germany," that there are no heirs, devisees or legatees elsewhere eligible to take said decedent's estate, and that therefore the estate consisting of real and personal property of a probable value of $20,000 had escheated to the State of Oregon. By leave of court and pursuant to Sections 117.510 to 117.560, Oregon Revised Statutes, prescribing the procedure for an heirship determination, the plaintiffs, who are the appellants here, being a brother, sister, two nieces and two nephews of the deceased [later stipulated by the parties and found by the court to be the decedent's next of kin] all residents of the Russian-occupied zone of Germany, filed a petition to determine heirship alleging themselves to be the decedent's next of kin and heirs at law and entitled to distribution of the estate. The State Land Board's answer alleged that plaintiffs were ineligible to inherit because the rights required by ORS 111.070 do not exist with respect to "East Germany," and demanded escheating of the estate to the State of Oregon. In their reply the heirs alleged

that said statute, that is ORS 111.070, is in violation of the existing policy of the Federal Government of the United States of America, constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States and that therefore said statute is invalid and should be given no effect by the court. There were other facts and circumstances which will be mentioned later but this appeal is aimed at the trial court's ruling, subsequently affirmed by the Supreme Court of Oregon, that the statute is valid and enforceable.

For the sake of clarity and brevity the territory described as the Russian-occupied zone of Germany, the Soviet-occupied zone, the Eastern Zone, as East Germany, as the Soviet Zone, the German Democratic Republic [GDR] or the Deutsche Demokratische Republik [DDR], will be called the "Soviet Zone," consisting of that portion of Germany occupied and administered pursuant to agreement of the Allied Powers by the armed forces of the U.S.S.R. after May 8, 1945.

(ii) The judgment or decree sought to be reviewed is the Findings and Order of Escheat entered by the Circuit Court of Multnomah County, Oregon, on April 15, 1965, escheating all of the clear proceeds of the estate to the State of Oregon [Appendix p. 25] as modified by the Order on Mandate entered by said court on June 27, 1966, pursuant to the decision of the Supreme Court of Oregon on appeal [Appendix p. 28], said Order affirming the escheating of the personal

property but declaring the heirs in the Soviet Zone to be entitled to the real property in accordance with the interpretation of the 1923 treaty with Germany in *Clark* v *Allen*, 331 U.S. 503 (1947).

The Supreme Court of Oregon denied appellants' petition for rehearing in its opinion filed June 3, 1966 [Appendix p. 24].

The Notice of Appeal is dated August 30, 1966, and was filed in the Supreme Court of Oregon on August 31, 1966.

(iii) The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U. S. Code § 1257 (2).

(iv) Cases believed to sustain jurisdiction in the circumstances of this case are the following decisions:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-9 (1922);

Fiske v. *Kansas*, 274 U.S. 380, 385-6 (1927);

Nashville C. & St. L. R. Co. v. *Walters*, 294 U.S. 405, 415 (1935);

Kern-Limerick Inc. v. *Scurlock*, 347 U.S. 110 (1954);

Marcus v. *Search Warrant*, 367 U.S. 717, 721 (1961).

(v) The statute of the State of Oregon whose validity is here involved is Section 111.070, Oregon Revised Statutes, Volume 1, page 856. It was enacted as Chapter 519, Oregon Laws 1951 (p. 900) and repealed and replaced Oregon's previous reciprocal inheritance rights statute, Section 61-107, O.C.L.A., which had orig-

inally been enacted as Chapter 399, Oregon Laws 1937 (p. 607).

ORS 111.070 provides as follows:

AN ACT

Relating to the taking of property by succession or testamentary disposition by aliens, not residing within the United States, or its territories; creating new provisions; and repealing section 61-107, O.C.L.A.

Be It Enacted by the People of the State of Oregon:

Section 1. (1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit,

use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property.

Section 2. Section 61-107, O.C.L.A. is repealed.

Approved by the Governor May 8, 1951.

Filed in the office of the Secretary of State May 9, 1951.

[effective on and after August 2, 1951. The above is quoted from Oregon Laws 1951 and varies slightly, immaterially and in form only, from the text in Oregon Revised Statutes. The body of the statute is identical in both publications.]

III. Questions Presented

The four questions presented by this appeal as set forth in the Notice of Appeal, namely whether or not ORS 111.070, the Oregon reciprocal inheritance rights statute, is repugnant to Article I, § 10, Article I, § 8 and/or the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and further whether said statute should

be declared invalid and given no effect because it conflicts with overriding federal law and policy, are closely akin and may be otherwise stated as follows:

a) May the State of Oregon, may any individual state of the Union, enact statutes restricting or taking away inheritance rights in estates within its borders from *some but not all* nonresident aliens, the application of such statute being dependent upon whether the officials and/or the courts of such state deem and find that the country of which said alien is a citizen or resident meets the terms and conditions laid down by the state for granting, restricting or denying rights of inheritance to nonresident aliens? Appellants think not and contend that any such regulation may be exercised only by the Federal Government.

b) Does not such legislation in effect and directly place each of such states in the position of sitting and passing in judgment upon the foreign nations whose nationals or residents are potential heirs, upon the laws, the forms of government, the idealogies, the foreign policies of such nations, and whether a particular foreign nation's posture is friendly towards or inimical to the United States and the interests of its people; and if so,

c) Does not such action of the individual state result in its direct, indeed flagrant invasion of the exclusive power of the Federal Government to regulate the foreign relations of the United States? Appellants think so and submit that by reason thereof the reciprocal inheritance rights statute of Oregon as well as similar

statutes of other states are repugnant to the pertinent provisions of the federal constitution, invalid and may not be given effect by the courts.

Consideration of these questions will necessitate re-examination by this Court of its decision in *Clark* v. *Allen*, 331 U.S. 503 (1947) in the light of national and international events and the judicial decisions by the state courts during the past twenty years or more—this for the reason that every effort to prevail upon the state courts to reconsider these questions has gone down before the bar of *Clark* v. *Allen*.

IV. Statement of the Case

The Facts

The facts of the case are simple and not in dispute. Pauline Schrader, a resident of Portland, Oregon, died there, intestate, on September 30, 1962. She was a widow, had and left no issue, she was a naturalized American citizen, and left an estate appraised at $17,764.72 consisting of real property, that is her modest home appraised at $4500 [later sold for $2,250.00], the rest in savings and other personalty. As she had no relatives in Oregon, William J. Miller, an undertaker who conducted her funeral, was appointed administrator of her estate by the probate department of the Circuit Court of Multnomah County, Oregon. Subsequently it was determined and stipulated that her next of kin and heirs are the appellants, a brother, sister, two nephews and two nieces all residing at or near decedent's native town not far from Leipzig in the Soviet Zone of Germany.

Federal Questions Raised and Passed Upon in Courts Below

As explained under II(i) above the constitutional invalidity of the Oregon reciprocal inheritance rights statute was alleged in the heirs' (appellants') Reply set forth at page 8 of Appellants' Abstract of Record and Brief, the material portion reading as follows:

> "In reply to paragraph III of said answer plaintiffs allege that Section 111.070, Oregon Revised Statutes, is in violation of the existing policy of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States of America; that therefore said statute is invalid and should be given no effect by this Court."

The question was extensively argued in the written briefs and the oral arguments of counsel to the Circuit Court and passed upon by the trial judge in his oral opinion [Appendix p. 31] as follows:

> "The contention that ORS 111.070 is in violation of the existing policy of the Government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations and therefore is invalid and should be given no effect by this Court is without merit in view of the decision of the United States Supreme Court in the case of *Clark* v. *Allen,* 331 U.S. 503, 91 L. Ed. 1633. If the rules of law announced in that case should be changed because of changed conditions

in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court."

On appeal the question was argued under Proposition IV from pages 49 to 56 inclusive of Appellants' Abstract of Record and Brief, and in Appellant's Reply Brief at pages 18 to 22 inclusive. The Supreme Court of Oregon in its opinion filed March 23, 1966, passed upon the question as follows [82 Or. Adv. Sh. at 452, 412 P2d at 791 [Appendix p. 19].

"Plaintiffs argue, however, that even if the provision of Article IV of the treaty is inapplicable, the personal property may not be escheated pursuant to the Oregon statute because the statute is an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. They contend that the statute violates Article I, Section 10 of the United States Constitution. They imply that the subject matter of the statute is within the treaty-making power of the federal government and is an area of legislation from which the states are excluded by virtue of Article VI of the Constitution. This argument was also put to bed by *Clark* v. *Allen,* supra. The court was there dealing with a California statute similar to ORS 111.070. It was argued that the statute was an unconstitutional 'extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government.' 331 US at 516. The court held that a state statute governing the descent and distribution of property must give way only if there is a conflict with 'an overriding fed-

> *eral policy as where a treaty makes different or conflicting arrangements. Hauenstein* v. *Lynham, supra.*' 331 US at 517 (emphasis ours)."

The question was again raised and extensively argued as Assignment of Error No. VI in appellants' Petition for Rehearing and Brief at pages 20 to 22 inclusive, but the Supreme Court of Oregon did not again pass upon or mention the question in its opinion filed *June 3, 1966, denying the Petition for Rehearing* [82 Adv. Sh. 861, 415 P.2d 15, Appendix p. 24]. Mention of *Clark* v. *Allen, supra,* there, was in connection with another question not included in this appeal.

The federal question here presented, that is the questioned validity of the state statute [ORS 111.070] on the ground of its being repugnant to the Constitution, treaties or laws of the United States, has therefore been actively in this case at all times in the proceedings below and the decision was in favor of the state statute's validity, thus bringing this appeal squarely under 28 U.S.C. § 1257 (2).

V. Federal Questions Presented Are so Substantial as to Require Plenary Consideration by this Court

Appellants are aware that in *Clark* v. *Allen, supra,* this Court in 1947 [at 331 U.S. 517] rejected the objections there made to a very similar California reciprocity statute and declined to declare that statute unconstitutional. However this Court at that place also said:

> "Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey,* 305 U.S.

188, 193; *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham, supra.* Then the state policy must give way. Cf. *Hines* v. *Davidowitz*, 312 U.S. 52."

Even if it were granted, although by no means conceded, that, on the same grounds stated in *Clark*, Oregon's corresponding reciprocity statute would then, in 1947, have been upheld as likewise invulnerable to the attack there and here made of unconstitutionality because an attempted invasion of the exclusive federal power to regulate the foreign relations of the United States, appellants contend and will endeavor to demonstrate that the events of the last twenty years or so and conditions presently existing compel a reexamination of *Clark* and a different ruling in the case at bar. Even then, shortly after the end of World War II, the Attorney General of the United States in his brief in *Clark* [at p. 75] described the California statute as a "recurrent source of diplomatic friction." In *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 415, this Court redeclared a rule well settled by its decisions that:

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

There has indeed been a radical change in conditions between 1947 and 1966, and the case at bar presents a vastly different set of facts than those in *Clark*.

Firstly, it should be pointed out that the Oregon statute, that is ORS 111.070, enacted in its present, here applicable form in 1951, while basically intended to cover the same field of reciprocal inheritance rights and to accomplish the same purposes as Section 259 of the California Probate Code, is far more demanding in its requirements and far more confiscatory in its effect than California's statute was in 1942 and is today. The California statute, for instance, did not contain, in fact has never contained, the requirement in subparagraph (1)(c) of ORS 111.070. This provides that even if the required reciprocal rights of inheritance exist and even if an American heir has the required right to receive payment within the United States of his inheritance from the foreign country, the alien heir would still be denied his inheritance—and it would be taken by the state as escheat, in the absence of some other "eligible" heir—unless he could prove to the satisfaction of the court that he would "receive the benefit, use or control" of his Oregon inheritance "without confiscation, in whole or in part, by the government" of his country. This, then, is a highly important difference between the statute before the Court in *Clark* and the statute before the Court here. It directly requires the Oregon court to receive and consider evidence of internal conditions in a foreign country and to sit in judgment on that foreign country's government, its laws, its policies, its idealogy, on the integrity and credibility of its officials, including those of the highest rank.

Precisely this happened, for example, in *State Land Board of Oregon* v. *Pekarek,* 234 Or. 74, 378 P.2d 734

(1963), where the Supreme Court of Oregon affirmed the escheat of an estate consisting of a savings account in a Portland, Oregon, bank, left by a citizen and resident of Czechoslovakia who had accumulated the money while in this country and left it in the Oregon bank for years after he had returned to his home and family in the old country, where, eventually, he died, The court pointed out that Czechoslovakia was listed in the Treasury Department Circular No. 655 [issued under 31 CFR § 211.3(a)] among the foreign countries to which U. S. Treasurer's checks or warrants could not be sent, and held that [234 Or. at 82]:

> "This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation."

although that federal regulation pertained only to United States government, not private funds such as inheritances, against the transmission of which no prohibitions or restrictions existed. The court's opinion of Czechoslovak officials, including that country's ambassador to the United States, whose certificate giving assurance that full reciprocity and rights existed as required by the Oregon statute, was received in evidence [p. 80], is stated at p. 83 as follows:

> "The statements of Czechoslovakian officials must be judged in the light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government of-

ficials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts."

Similar, and indeed much stronger criticism, some approaching the slanderous, of certain foreign governments and their officials may be found in numerous other decisions where reciprocal inheritance rights and similar statutes were involved, for example:

State Land Board v. *Kolovrat,* 220 Or. 448, 349 P2d 255 (1960) reversed on ground treaty applicable in *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961). (See 220 Or. at 460-1).

Arbulich's Estate, 41 Cal. 2d 86, 257 P.2d 433 (1953) (Quotation and criticism of the trial judge's extremely biased statements at 257 P.2d 447, 448.)

Stoian's Estate, 128 Mont. 52, 269 P.2d 1085 (1954) (The dissenting opinion at 269 P.2d 1090).

Spoya's Estate, 129 Mont. 83, 282 P.2d 456 (1955) (The dissenting opinion and the apology of the majority for the intemperate remarks therein at 282 P.2d 548).

Hosova's Estate, 143 Mont. 74, 387 P.2d 305 (1963) (The dissenting opinions at 387 P.2d 311).

Belemecich's Estate, Consul General of Yugoslavia at Pittsburgh v. *Pennsylvania,* 411 Pa. 506, 192 A.2d 740 (1963) 375 U.S. 395, Certiorari granted, judgment reversed (1964) (192 A.2d 741-3).

It is a certainty that such harsh, intemperate, derisive, defamatory, even contemptuous statements from highly

placed members of the American judiciary do not go unnoticed in the chancellories of the nations involved. That they must be a source of the deepest embarrassment to the State Department, and add gravely to its conduct of the relations with those countries, cannot for a moment be doubted.

Since World War II and *Clark* v. *Allen,* numerous other states throughout the country have adopted statutes similar to the Oregon statute which learned students of the subject have called the "Western" or "confiscatory" type because they originated in the west, in fact Oregon led the field with Chapter 399, Oregon Laws 1937, which became § 61-107, O.C.L.A. and was replaced in 1951 with ORS 111.070. Soon thereafter, in 1939, Montana adopted § 91.520, R.C.M. 1947, California in 1941 adopted § 259 of the Probate Code, and Iowa in 1951 adopted the provisions of the then California statute as its § 567.8, Iowa Code Annotated. In 1963 Nebraska adopted most of Oregon's 111.070 with certain ramifications. [Neb. Laws 1963, c. 21 § 1, p. 104, § 4-107, R. S. Supp. 1965]. All contain provisions for escheating the alien heir's inheritance if his country does not meet the conditions laid down in the statute and no other, "eligible" heir exists and claims (except in Montana where escheat occurs regardless of the existence of an "eligible" heir).

In the eastern part of the country the trend was towards the so-called "Eastern" or "withholding" statutes such as § 269a of the New York Surrogate's Act, and Pennsylvania's Act of July 28, 1953, P. L. 674,

which the Pennsylvania Supreme Court in *Belemecich, supra,* said: [192 A.2d at 741]:

> ". . . carries the sobriquet of 'Iron Curtain Act' because its purpose is to protect the moneys, physically in America, but belonging to people who fatefully find themselves behind the Iron Curtain of Communism."

New Jersey, Massachusetts, Connecticut and other eastern states have similar statutes designed to authorize the courts to withhold actual distribution and transmission of a foreign heir's or legatee's inheritance in the absence of proof that he would have the full use and benefit thereof. These statutes have, of course, as in the states with the "Western" type statutes, necessarily led courts to inquire into, and to sit in judgment upon the particular foreign country's government, its laws, its policies, its idealogy, the integrity and credibility of its officials, etc.

Space does not permit further extension of this discussion but reference is respectfully made to the learned and exhaustive treatise "The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates" by Professor Willard L. Boyd of the College of Law, University of Iowa, in Vol. 51, The Georgetown Law Journal 470 (1963). It appears to have been motivated by this Court's dismissal of the appeal, for want of a substantial federal question, in *Ioannou* v. *New York,* and the dissent of Mr. Justice Douglas, with whom Mr. Justice Black concurred, 371 U.S. 30. In recent years much literature has accumu-

lated on the subject. Of particular interest are Comment in Vol. 1963, Duke Law Journal 315, entitled "State Reciprocity Statutes and the Inheritance Rights of Nonresident Aliens," and, most recently, under Note and Comment in Vol. 45, Number 3 of the Oregon Law Review 221 (April 1966), a treatise entitled "International Law—Inheritance by Nonresident Aliens in Oregon; The Oregon Statute, the Effect of Treaties, and the Federal Law." Therein the decision of the Supreme Court of Oregon in the Schrader estate, which is the subject of this appeal, is severely criticized.

It is deemed pertinent to point out the radical differences between the case at bar and *Ioannou* v. *New York, supra,* in which the appeal was dismissed. Most importantly, there was before the Court in *Ioannou* the mild, non-confiscatory New York withholding statute, that is § 269a of the New York Surrogate's Court Act. There, as Mr. Justice Douglas pointed out, even such a modest "restraint" as prohibiting a Czechoslovak heir from assigning her New York inheritance to a niece in England as a gift might ". . . affect international relations in a persistent and subtle way." [371 U.S. 32]. Yet such an effect is as nothing compared to the effect on the relations with a country whose people are denied their rights of inheritance and whose inheritances are escheated, in plain language confiscated, by an American state. And not infrequently the injury has been accompanied by insult. In *Ioannou* the heir has not had her inheritance taken away by the statute, although that, as far as she is concerned, may be the end-result if she should die before, if ever, a future surro-

gate decides she may have it. In the case at bar the deprivation is complete, absolute, final.

It is a matter of common knowledge that in the countries of the civilized world, with the United States perhaps the only exception, inheritance laws are national in scope and are uniform throughout the country. The governments, and the people, of these countries cannot understand and cannot rationalize why from some American state inheritances flow without restriction, while other American states may seize away, or in the least withhold transmission of inheritances. In international affairs every action has a reaction. So far the reaction has not crystallized, but no one can deny that international relations have suffered and the whole nation will eventually be held to account.

A Great Urgency Exists

The countries most grievously affected are those countries of Europe from where most of the mass migrations came to the United States in the late 1800's and the early 1900's. It is the men and women who came in these mass migrations during the twenty years or so before the outbreak of World War I in August 1914 who are now dying off at an ever-increasing rate and whose desire, by testacy or intestate succession, is to benefit their loved ones back home, most of them in modest or needy circumstances. It is their desires that are being thwarted in many instances by the so-called Western, confiscatory reciprocity statutes and even by the milder so-called Eastern withholding statutes.

If anything is to be done, it must be done quickly. Vast irremedial damage has already been done, literally hundreds of estates are pending in the probate courts of this country in which there are heirs or beneficiaries in the affected countries. Their assets are substantial, undoubtedly aggregating into the millions, and every day new cases arise. Many estates pending in the "reciprocity" and "withholding" states are being held in abeyance awaiting the outcome of this most recent effort to seek invalidation of these statutes, specifically of course of ORS 111.070, with which similar statutes of the other states would presumably stand or fall.

Questions of Great Public Importance Presented

This case does indeed present questions of great public as well as individual importance so substantial as to require plenary consideration by this court, with briefs on the merits and oral argument, for their resolution. The holding of this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) seems to point the way. As the act of state doctrine was there held to be a matter of federal law, not subject to interpretation and application by the individual states, so if there is to be differentiation, discrimination if you please, between aliens of different nationalities, if one nonresident alien is to be permitted to inherit in the United States, another not because of the failure of his country to meet certain standards or requirements, this should and must be governed and determined by federal law uniformly effective throughout the nation.

The foreign relations of the United States are, be-

yond any shadow of doubt, being affected, seriously and adversely, by ORS 111.070 and by the interpretations and application thereof by the courts of the State of Oregon. If it was a valid statute when enacted, which is by no means conceded, it has become invalid under the present, different set of facts and by change in the conditions to which it is applied (*Nashville C. & St. L. Ry.* v. *Walters, supra*).

It may be presumed that legislators of other states, ever on the lookout for new sources of revenue, will be tempted to emulate the action of Oregon, of California, Montana, Iowa, etc., in seizing by escheat the inheritances of some nonresident aliens whose countries will not or cannot meet the particular state's conditions. There is a certain popular appeal in the "Iron Curtain" rule. It would serve to avoid much painful and costly litigation if this Court would, as is here prayed for, declare that such legislation is in a field of exclusive federal competence upon which the individual states may not encroach.

As recently as August 2, 1966, the California Supreme Court in *Estates of Larkin and Terry,* 65 A.C. 49, 52 Cal. Rptr. 441, ruling *for* reciprocity with the U.S.S.R. [but see *Estate of Gogasbashvele,* 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961) holding *against* reciprocity with the U.S.S.R.], refused to consider the constitutional validity of the California reciprocity statute, deeming that question to have been settled by *Clark* v. *Allen, supra.* However, the court did make the following most cogent comment [52 Cal. Rptr. at 456-7]:

"The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boyd, The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, Succession, 1964 Annual Survey of American Law 585, 591.)

"Similarly, Justice Douglas, himself the author of *Clark*, has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (Ioannou v. New York (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construction of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'farfetched' in *Clark*."

And still more recently, on September 7, 1966, the California District Court of Appeal in the *Estate of Magdalena Chichernea*, 244 A.C.A. 727, 53 Cal. Rptr. 535, rehearing denied 9/26/66, ruling *against* reciprocity with Rumania [but see *Estate of Kennedy*, 106 Cal. App. 2d 621, 235 P.2d 837 (1951) holding *for* reciprocity with

Rumania] likewise refused to reconsider the constitutional validity of the California reciprocity statute, saying [53 Cal. Rptr. at 540]:

> "Petitioners contend that Probate Code, § 259 is unconstitutional in that it denies to them the equal protection of the laws and due process under the Fourteenth Amendment of the United States Constitution and that it constitutes an unwarranted infringement on the powers of the Federal Government in the area of foreign relations. In Clark v. Allen, 331 U.S. 503, 517, 67 S. Ct. 1431, 91 L. Ed. 1633; Estate of Knutzen, 31 Cal. 2d 573, 191 P.2d 747; Estate of Bevilacqua, 31 Cal. 2d 580, 582, 191 P.2d 752, these arguments are analyzed and rejected. We agree with these cases."

It is clear therefore that unless and until this Court reexamines *Clark* v. *Allen* and holds that the ruling therein, made in 1947, is no longer valid in view of the changed conditions and what has happened in the world during the past two decades, the state courts will not, and perhaps could not, invalidate these reciprocity and withholding statutes. As stated by Mr. Justice Douglas in *Ioannou, supra* [371 U.S. at 33]:

> "The question seems substantial and does not seem to be foreclosed by *Clark* v. *Allen,* 331 U.S. 503."

VI. CONCLUSION

Appellants submit that they have shown that substantial federal questions are presented in this case, indeed questions of vast national and international importance most seriously affecting the foreign relations

of the United States. When state laws or state policies affect the foreign relations of the country and thus adversely affect the nation as a whole, the state must yield and a state statute having that result must be invalidated and given no effect.

Appellants pray that jurisdiction by this Court be noted and this case set for plenary consideration.

Respectfully submitted,

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